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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE NATIONAL GRANGE OF THE
ORDER OF PATRONS OF
HUSBANDRY, THE CALIFORNIA
STATE GRANGE et al.,

Plaintiffs and Respondents,

v.

ELLIS LAW GROUP LLP,

Defendant and Appellant.

A153603

(Sonoma County
Super. Ct. No. SVC-260954)

Ellis Law Group LLP (ELG) appeals from the trial court’s order disqualifying it from representing defendant Bennett Valley Guild because ELG employed an attorney who previously represented one of the plaintiffs. We affirm.

BACKGROUND

I. The National Grange

The National Grange of the Order of Patrons of Husbandry (National Grange) is “a nationwide fraternal organization that was formed in 1867 to represent the interests of America’s farmers.” (*National Grange of Order of Patrons of Husbandry v. California Guild* (2017) 17 Cal.App.5th 1130, 1135 (*California Guild*).) It comprises various levels of granges, “including junior granges and subordinate granges (Subordinate Grange) (which are membership granges), Pomona granges (which are district membership Granges), state granges (State Grange) (which are state delegate bodies), and the National Grange, which is ‘the controlling and supreme law making division of the Order from

which body all the other Granges of the divisions of the Order . . . derive their rights and powers.’ ” (*Id.* at p. 1135.) “[E]ach State Grange is principally composed of the Masters of active Subordinate and Pomona granges within the jurisdiction of the State Grange.” (*Id.* at p. 1136.)

The National Grange and its member granges were and continue to be governed by a digest of laws, including a constitution and bylaws. (*California Guild, supra*, 17 Cal.App.5th at p. 1135.) The bylaws of the National Grange provide that “ ‘[t]he Constitution of the Order . . . is the supreme law of the Order and shall be determinative of the rights and duties of the various Granges of the divisions of the Order and members thereof as provided in these By-Laws.’ ” (*Id.* at p. 1135.)

The National Grange’s bylaws permit it to issue a charter to or revoke a charter of a lower level grange. (*California Guild, supra*, 17 Cal.App.5th at pp. 1137–1138.) If a subordinate grange’s charter is revoked, the bylaws provide that the National Grange will retain control of any property held by a subordinate grange until the subordinate grange is reorganized under the National Grange’s digest of laws. (*Id.* at p. 1137.)

II. Earlier Litigation Concerning the National Grange

The present case and earlier cases relate to governance and property disputes between the National Grange and some of its former member granges in the state of California. (*California Guild, supra*, 17 Cal.App.5th at p. 1139.)

The original dispute began when the Master of the National Grange, Ed Luttrell, ordered the California State Grange’s executive committee to investigate the California State Grange’s Master, Robert McFarland, for misconduct in 2011. (*California Guild, supra*, 17 Cal.App.5th at p. 1138.) Although that committee cleared McFarland in January 2012, three of the seven members sent Luttrell a “ ‘minority report’ ” asserting the investigation was incomplete. (*Ibid.*) Luttrell suspended McFarland in June 2012 and again in August 2012. (*Ibid.*)

Most of the California State Grange’s executive committee elected to ignore the second suspension. (*California Guild, supra*, 17 Cal.App.5th at p. 1138.) The National Grange consequently suspended the California State Grange’s membership to the

National Grange. (*Ibid.*) Four of the California State Grange executive committee members voted not to honor its suspension or that of McFarland. (*Id.* at pp. 1138–1139.)

The National Grange responded by revoking the California State Grange’s charter and filing a complaint for declaratory and injunctive relief against the now suspended California State Grange. (*California Guild, supra*, 17 Cal.App.5th at p. 1139.) A few months later, the same California State Grange officers and members who had cleared McFarland “approved a new set of bylaws that reflected that the [California] State Grange was no longer affiliated with any national organization.” (*Id.* at p. 1140.) This unaffiliated organization would later change its name to the California Guild. (*Id.* at p. 1140, fn. 5.) Even though it was no longer affiliated with the National Grange, the California Guild kept the property it previously held when it was operating as the California State Grange. (*Id.* at p. 1140.)

The National Grange amended its complaint to allege that, with the revocation of the California State Grange’s charter, the disputed property “became the property of the National Grange to hold in trust until the California State Grange was reorganized under grange law.” (*California Guild, supra*, 17 Cal.App.5th at p. 1139.) The National Grange thus sought to regain control of the property held by California Guild. (*Id.* at p. 1140.)

“In February 2014, a number of Subordinate Granges in California organized a new corporation—The Grange of the State of California’s Order of Patrons of Husbandry, Chartered—to become the new chartered State Grange within the Order.” (*California Guild, supra*, 17 Cal.App.5th at p. 1140.) The National Grange granted a charter to this new organization, which became the new California State Grange. (*Ibid.*)

Litigation over real property controlled by the National Grange and its former subordinate members, including the California Guild and Bennett Valley Guild (described more fully below), has been ongoing ever since.¹

¹ The Third District Court of Appeal ruled in favor of the National Grange, returning the property held by the California Guild to the National Grange’s control. (*California Guild, supra*, 17 Cal.App.5th at pp. 1160–1161.)

III. Porter Scott and Former Associate Anthony Valenti

The National Grange hired the Porter Scott law firm (Porter Scott) as counsel for the original lawsuit against the California Guild in August 2012. Porter Scott has represented the National Grange in several cases against the California Guild since then.

Anthony Valenti was an associate at Porter Scott from March 2014 to October 2014. While working at Porter Scott, Valenti billed the National Grange for 26 hours of work. His work for the National Grange included legal research, attending teleconferences, reviewing deposition transcripts, and sending at least one email concerning discovery to National Grange Master Luttrell. He also communicated with the newly chartered California State Grange's former counsel, Boutin Jones, concerning the California State Grange's reorganization and strategies for litigating against the California Guild.²

Valenti worked at other jobs for a year and a half after leaving Porter Scott, before joining ELG in April 2016. As ELG was representing McFarland at the time, partner Mark Ellis asked Valenti whether he had ever represented the National Grange while at Porter Scott; Valenti replied that could not remember doing so. Valenti continues to maintain that he does not recall working on matters for the National Grange while at Porter Scott. Still, as a precaution, Ellis ordered Valenti to be "ethically screened" or "walled off" from any discussions, meetings, conferences, and communications concerning litigation involving the National Grange.

To prove Valenti was "walled off" from the National Grange litigation, ELG submitted an undated memorandum signed by all ELG employees agreeing that Valenti and his legal assistant, Jennifer M., were not allowed to access materials or work on matters related to the National Grange litigation. Valenti and Jennifer M. also signed an undated memorandum agreeing not to have any contact with materials related to or to solicit information about the National Grange litigation. ELG further submitted undated

² All subsequent references to the California State Grange refer to the newly-chartered California State Grange.

photographs showing that the materials for the National Grange litigation were kept in rooms Valenti could not access.

But this ethical wall had significant cracks. Valenti's former legal assistant was unaware the wall existed or that there were purportedly procedures to prevent Valenti from accessing physical or electronic files related to the National Grange litigation. She was not listed on either undated memorandum, suggesting that the memoranda were signed after her departure in January 2017. Valenti was accidentally copied on emails concerning the National Grange litigation because his name began with the same letter as an associate working on it. And nearly a year after Valenti joined ELG, an ELG legal assistant filed a notice of appearance for Valenti while using a form to withdraw a former ELG associate's appearance in a federal case concerning the National Grange. Valenti's appearance in the federal case was withdrawn a few days later.

In November 2016, ELG realized that Valenti had in fact worked on the National Grange litigation. It came to this realization after reviewing files from Boutin Jones, which had been representing the California State Grange, and uncovering an e-mail Valenti had sent on behalf of the National Grange.

IV. Prior Disqualification Motions

Based on ELG's employment of Valenti, Porter Scott first moved to disqualify ELG on an earlier case in Sacramento Superior Court in March 2017. The trial court granted the motion for disqualification, and the Third District Court of Appeal soon after affirmed that order. For the same reason, the Third District Court of Appeal also disqualified ELG from representing the California Guild and other appellants in a separate case brought by the National Grange.

In addition to the state matters, Porter Scott moved to disqualify ELG from representing the California Guild in two trademark cases pending in the Eastern District of California. The Eastern District denied these disqualification motions. Only one of the orders denying disqualification was appealed; the Ninth Circuit affirmed.

V. Proceedings in Present Case

On December 8, 2016, former members of Bennett Valley Grange, a subordinate grange in Santa Rosa, voted to disaffiliate from the National Grange, create a new organization called Bennett Valley Guild, and affiliate with the California Guild. On January 18, 2017, the National Grange revoked Bennett Valley Grange's charter.

Some of the members of Bennett Valley Grange disagreed with the disaffiliation and reorganized Bennett Valley Grange pursuant to the National Grange's rules. The National Grange restored Bennett Valley Grange's charter to this group of members on January 30, 2017.

On January 27, 2017, the California State Grange requested that Bennett Valley Guild's leaders return Bennett Valley Grange's property, including real property. On February 8, 2017, ELG responded on behalf of Bennett Valley Guild's leaders, declining to return the property and claiming there was no legal basis requiring Bennett Valley Guild to do so.

On July 6, 2017, the National Grange, the California State Grange, and Bennett Valley Grange (collectively, "plaintiffs") filed the complaint in this case alleging several causes of action to recover the property that they allege Bennett Valley Guild wrongfully converted. ELG answered the complaint on behalf of Bennett Valley Guild two months later.

Six weeks after ELG filed Bennett Valley Guild's answer, plaintiffs moved to disqualify ELG as counsel for Bennett Valley Guild. The trial court issued a written order granting the motion to disqualify ELG.

As a disqualified law firm, ELG has standing to appeal that ruling in its own name and timely filed this appeal. (*A. I. Credit Corp. v. Aguilar & Sebastinelli* (2003) 113 Cal.App.4th 1072, 1077.)

DISCUSSION

Before turning to the merits, we address two procedural arguments advanced by ELG: lack of standing and waiver. We then address the substantive issue of ELG's disqualification.

I. Standing to Assert Disqualification

ELG contends the California State Grange lacks standing to disqualify ELG because the “California State Grange was not an actual client of Porter Scott during the relevant 2014 time period when Mr. Valenti worked at Porter Scott . . . [so] there is no imputation of such knowledge [from the California State Grange] to Valenti, much less ELG.” But, as the trial court correctly noted, the National Grange is one of the plaintiffs in this case, has standing to file the motion to disqualify, and moved to disqualify ELG based on that standing. For that reason alone, this argument fails.

Furthermore, a party does not need to prove an actual client relationship to have standing. “Standing arises from a breach of the duty of confidentiality owed to the complaining party, regardless of whether a lawyer-client relationship existed.” (*DCH Health Service Corporation v. Waite* (2002) 95 Cal.App.4th 829, 832.) An attorney may owe a duty of confidentiality to a non-client affiliate if that attorney obtained confidential information from that non-client affiliate while representing the affiliated client. (*Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223, 240–241.) Here, Porter Scott and Valenti represented both the National Grange and the California State Grange for several months before the latter entity obtained separate counsel, and in that context, Valenti obtained confidential information from the California State Grange—specifically its reorganization and litigation strategies against the California Guild. The California State Grange therefore has standing to challenge ELG’s representation of Bennett Valley Guild.

II. Waiver

ELG next claims plaintiffs waived any right to seek disqualification because “they were entirely aware of the conflict of interest and chose not to pursue disqualification until ELG began to defend [the] National Grange’s claims effectively.”

When reviewing a disqualification motion, “a trial court may properly consider the possibility that the party brought the motion as a tactical device to delay litigation. [Citation.] Where the party opposing the motion can demonstrate prima facie evidence of unreasonable delay in bringing the motion causing prejudice to the present client,

disqualification should not be ordered. The burden then shifts back to the party seeking disqualification to justify the delay. [Citation.] Delay will not necessarily result in the denial of a disqualification motion; the delay and the ensuing prejudice must be extreme.” (*Western Continental Operating Co. v. Natural Gas Corp.* (1989) 212 Cal.App.3d 752, 763–764.)

Plaintiffs did not unreasonably delay filing the motion. Plaintiffs filed this action on July 6, 2017 and only confirmed that ELG would be representing Bennett Valley Guild in this lawsuit when ELG filed the answer on behalf of Bennett Valley Guild on September 8, 2017. Just six weeks later, they moved to disqualify ELG.

ELG nevertheless claims that Porter Scott knew about Valenti’s employment and delayed filing a disqualification motion in other related cases for nine months. ELG compares the instant delay to the delay in *Employers Ins. of Wausau v. Albert D. Seeno Const.* (N.D. Cal. 1988) 692 F.Supp. 1150 (*Wausau*). In *Wausau*, the plaintiff moved to disqualify defense counsel 14 months after the case was filed based on defense counsel’s prior representation of the plaintiff on another matter. (*Id.* at pp. 1164–1165, fn. omitted.) Noting the plaintiff had not explained why it had not raised the issue earlier, the court held that the 14-month delay was unreasonable and denied the disqualification motion. (*Id.* at 1166.)

Wausau, however, is inapposite. First, even assuming plaintiffs knew ELG would be representing Bennett Valley Guild the moment this case was filed, only a few months elapsed between plaintiffs’ filing of this case and their motion to disqualify, which is nearly a year less than the delay in *Wausau*. Second, *Wausau* does not stand for the principle that a delay in disqualifying counsel in related litigation requires denial of disqualification motions in later actions.

There is thus no merit to ELG’s contention that plaintiffs unreasonably delayed in seeking disqualification.

III. Vicarious Disqualification of ELG

Turning to the merits of the disqualification order, we reject ELG's argument that the court erred in concluding that ELG was vicariously disqualified from representing Bennett Valley Guild.

A. Standard of Review

"Generally, a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. [Citations.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. [Citation.] However, the trial court's discretion is limited by the applicable legal principles. [Citation.] Thus, where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law. [Citation.] In any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion." (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143–1144 (*Speedee Oil*).)

B. Governing Legal Principles

A trial court has the authority to control the conduct of its ministerial officers, including the discretion to disqualify an attorney, in the furtherance of justice. (*Henriksen v. Great American Savings & Loan* (2002) 11 Cal.App.4th 109, 113 (*Henriksen*); Code Civ. Proc., § 128, subd. (a)(5); *Comden v. Superior Court* (1978) 20 Cal.3d 906, 920, fn. 4.) A trial court abuses its discretion if it "fails to exercise discretion where such an exercise is required." (*Henriksen, supra*, 11 Cal.App.4th at p. 113.)

As explained in *Henriksen*, “[u]nder Rule 3-310(D)^[3] of the California Rules of Professional Conduct, an attorney may not represent a new client whose interests are adverse to the former client on a matter on which the attorney has obtained confidential information. The purpose of the rule is to protect the confidential relationship which exists between attorney and client, a relationship which continues after the formal relationship ends. [Citation.] The fiduciary nature of that relationship requires the application of strict standards. [Citation.] For that reason, a former client may seek to disqualify a former attorney from representing an adverse party by showing that the former attorney possesses confidential information adverse to the former client.” (*Henriksen*, *supra*, 11 Cal.App.4th at p. 113, fn. omitted.)

An attorney who accepts employment adverse to a former client may be disqualified if there is a “substantial relationship” between the subjects of the two lawsuits. (*State Farm Mutual Automobile Ins. Co. v. Federal Ins. Co.* (1999) 72 Cal.App.4th 1422, 1430; Rules of Prof. Conduct, former rule 3-310, subd. (e).) “[A] ‘“substantial relationship” ’ exists [for these purposes] whenever the subjects of the prior and the current representations are linked in some rational manner.” (*Jessen v. Hartford Casualty. Ins. Co.* (2003) 111 Cal.App.4th 698, 711.)

The trial court determines whether a substantial relationship exists by examining the facts and legal issues involved in the two cases along with the nature and extent of the attorney’s involvement in both, including the time spent and possible exposure to policy or strategy. (*H.F. Ahmanson & Co. v. Salomon Bros., Inc.* (1991) 229 Cal.App.3d 1445, 1455 (*H.F. Ahmanson*).) Once the party seeking disqualification shows there is a “ ‘substantial relationship’ ” between the current parties and the prior representation, “access to confidential information . . . is *presumed* and disqualification . . . is mandatory.” (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.) However, an attorney can overcome this presumption if she affirmatively proves she had no exposure to

³ Rule 3-310 was in effect at the time of the disqualification motion. The Rules of Professional Conduct have since been revised and renumbered, effective November 1, 2018.

confidential information. (*H. F. Ahmanson, supra*, 229 Cal.App.3d at p. 1455 [disqualification not required “ ‘when there is no realistic chance that confidences were disclosed’ ” between lawyer and client].)

An individual attorney’s disqualification on a matter will normally extend vicariously to that attorney’s entire law firm to protect legitimate client expectations that their attorneys will protect their confidences. (*Speedee Oil, supra*, 20 Cal.4th at p. 1139.) Such vicarious disqualification is based on the “ ‘everyday reality that attorneys, working together and practicing law in a professional association, share each other’s, and their clients’, confidential information.’ ” (*In re Charlissee C.* (2008) 45 Cal.4th 145, 161, citing *Speedee Oil, supra*, 20 Cal.4th at pp. 1153–1154.)

C. Application to this Case

Turning to the present case, we first agree with the trial court’s analysis that there is a substantial relationship between the litigation at issue in this case and prior cases involving the National Grange, including the National Grange-California Guild matter on which Valenti worked. As the trial court correctly explained, both cases concern “a dispute over the Grange identity, rights to the same property, name, etc. The only difference is that this case involves a dispute over the specific local branch and its property. Otherwise, the issues, law and facts appear necessarily almost the same.” Access to confidential information is therefore presumed. (*Flatt v. Superior Court, supra*, 9 Cal.4th at p. 283.)

And indeed, the record confirms the presumption. Valenti’s billing records demonstrate that he corresponded directly with the National Grange’s Master, Ed Luttrell. Valenti also communicated with the California State Grange’s counsel concerning its reorganization and strategies for litigating against the California Guild. Valenti therefore cannot meet the exception for attorneys who lacked exposure to confidential information. (*H. F. Ahmanson, supra*, 229 Cal.App.3d at 1455.) And notwithstanding ELG’s assertions to the contrary, there is no exception for an attorney who, like Valenti, cannot *recall* being exposed to confidential information if the record demonstrates that the attorney was in fact exposed to it.

As Valenti had access to the National Grange's confidential information (and would therefore himself be disqualified), we must next address whether Valenti's knowledge is imputed to ELG, such that ELG should be vicariously disqualified from representing Bennett Valley Guild. Notwithstanding the general rule requiring vicarious disqualification of a conflicted attorney's entire law firm (*Speedee Oil, supra*, 20 Cal.4th at p. 1139), ELG relies on *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 (*Kirk*) to support its argument that an "ethical wall" can prevent disqualification. *Kirk* distilled the relevant vicarious disqualification case law as follows: "(1) appellate courts initially concluded vicarious disqualification was not automatic, but instead subject to a balancing test; (2) *Henriksen* concluded the burden of rebutting the presumption of imputed knowledge simply could not be satisfied in the case of a tainted attorney who represented one party and switched sides in the same case; (3) the Supreme Court favorably cited *Henriksen* and appeared to state a rule of automatic vicarious disqualification any time material confidential information was presumed to be held by the tainted attorney (*Flatt*); (4) the Supreme Court subsequently suggested that whether vicarious disqualification can be avoided by a proper ethical wall was still an open question (*Speedee Oil*); and (5) the Supreme Court has never directly addressed the issue on the merits." (*Kirk*, at p. 800.) *Kirk* therefore concluded that "in the proper circumstances, the presumption is a rebuttable one, which can be refuted by evidence that ethical screening will effectively prevent the sharing of confidences in a particular case." (*Id.* at p. 801.)

Even following *Kirk*'s assumption that an ethical wall may be used to avoid vicarious disqualification, ELG cannot demonstrate that the ethical wall in this case was timely or effective. Although ELG submitted exhibits showing it took precautions, it is unclear when it did so. Indeed, Valenti's former legal assistant said that the National Grange litigation materials were stored in areas accessible to all firm members, including Valenti, while she was there. She was also unaware that Valenti was not supposed to access or work on the National Grange matters. A logical explanation for her lack of knowledge is that the measures and memoranda memorializing those measures were put

in place after her departure in January 2017 and not when Valenti first arrived months earlier. This explains why the memoranda are undated and do not include her signature. We therefore disagree that ELG's efforts to establish an "ethical wall" between Valenti and ELG's work on the National Grange litigation exempted it from vicarious disqualification.

ELG also relies on the United States District Court for the Eastern District of California's decisions declining to disqualify ELG. But the district court's unpublished decisions concerning disqualification are not controlling. (*Balsam v. Trancos, Inc.* (2012) 203 Cal.App.4th 1083, 1100.) And we agree with the reasoning in cases such as *Henriksen* and the Third District Court of Appeal's decisions on this same disqualification issue in the litigation between the National Grange and the California Guild.

D. Public Policy Considerations

In arguing that the trial court abused its discretion, ELG contends Bennett Valley Guild strongly desires to retain ELG and that this disqualification motion is merely a ploy to remove competent counsel. This contention does not compel reversal.

When determining whether counsel should be disqualified, we must " 'weigh the combined effect of a party's right to counsel of choice, an attorney's interest in representing a client, the financial burden on a client of replacing disqualified counsel and any tactical abuse underlying a disqualification proceeding against the fundamental principle that the fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel unencumbered by conflicts of interest.' " (*In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556, 562–563, quoting *William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1042, 1048.)

We find that Bennett Valley Guild's competing interests are outweighed by the National Grange's interests in maintaining its confidentiality. ELG's disqualification took place early on in this case, reducing potential costs of replacing counsel. But even if ELG was Bennett Valley Guild's longstanding counsel, ELG has not cited any case with analogous facts where the current client's interest in being represented by its selected

counsel trumped a former client’s timely assertion of its right to confidentiality from its former attorney. Disqualification motions always involve a conflict between the clients’ right to counsel of their choice and the need to maintain ethical standards, but in this case, “[t]he important right to counsel of one’s choice must yield to ethical considerations that affect the fundamental principles of our judicial process.” (*Speedee Oil, supra*, 20 Cal.4th at p. 1145.)

In sum, the trial court correctly concluded that ELG must be vicariously disqualified from representing Bennett Valley Guild.⁴

DISPOSITION

The order disqualifying ELG is affirmed.

⁴ We note that this result is consistent with newly adopted Rules of Professional Conduct, rule 1.10, which (as noted above) came into effect in November 2018. Rule 1.10 requires vicarious disqualification in matters such as the case at bar unless “(i) the prohibited lawyer did not substantially participate in the same or a substantially related matter; [¶] (ii) the prohibited lawyer is timely screened[] from any participation in the matter . . . ; and (iii) written[] notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this rule.” (Rules Prof. Conduct, rule 1.10, subd. (a).) Even assuming Valenti’s 26 hours of work is not enough to constitute substantial participation in the litigation between the National Grange and California Guild, ELG failed to timely screen Valenti and failed to provide written notice to the National Grange. Thus, ELG could not avoid disqualification even if rule 1.10 were in effect when the National Grange moved to disqualify.

BROWN, J.

WE CONCUR:

POLLAK, P. J.

TUCHER, J.

National Grange of the Order of Patrons of Husbandry, The California State Grange et al. v. Ellis Law Group LLP
(A153103)